

**BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA**

DOCKET NO. 2019-331-E

IN RE:

**Enrique McMilion, Jr.,
Complainant/Petitioner,**

v.

**Duke Energy Carolinas, LLC,
Defendant/Respondent.**

**Duke Energy Carolinas, LLC's
Answer and Motion to Dismiss**

Pursuant to S.C. Code Ann. § 58-27-1990, S.C. Code Ann. Regs. 103-829, and applicable South Carolina law, respondent, Duke Energy Carolinas, LLC (“DEC” or the “Company”) hereby answers the complaint filed in the above-referenced proceeding and moves the Public Service Commission of South Carolina (the “Commission”) to dismiss the above-captioned matter on the merits because the Complaint contains no allegation that DEC has violated any applicable statute or regulation for which the Commission can grant relief, and a hearing in this case is not necessary for the protection of substantial rights. The Company also requests that the Clerk’s office delay establishing a procedural schedule until such time as the Commission has ruled on this Motion to Dismiss. DEC shows the following:

I. Background

This is the third complaint filed by Mr. McMilion since December 2018. The first two complaints were both dismissed,¹ and the Commission denied Complainant’s request for rehearing

¹ Order No. 2019-427, Docket No. 2018-379-E (June 12, 2019); Order No. 2019-686, Docket No. 2019-230-E (Sept. 25, 2019).

in the most prior proceeding.² Less than a week after the Commission denied Complainant's request for rehearing on October 9, 2019, Mr. McMilion filed the complaint in the instant proceeding.

In the Complaint filed in this proceeding, Mr. McMilion states that a meter technician attempted to install a digital meter at Mr. McMilion's residence, but that Mr. McMilion first requested that he provide "the contract showing the amended term and conditions before a digital meter was installed." Mr. McMilion claims that installing a digital meter at his residence "is an infringement on an individual[']s right to contract," and that the provision of S.C. Code Ann. Regs. 103-320 stipulating that service be measured by meters furnished by the utility is a "14th amendment substantive due process violation." The Complaint asks that the Commission require the Company to "provide in writing [sic] in contract form the amended terms and conditions with full disclosure signed by both parties," that the Company "honor the original contract (analog meter) not in dispute," and that the Commission "abolish or amend rule 103-320 as to not be inconsistent with law." The Commission also docketed correspondence from Mr. McMilion addressed to an employee of the South Carolina Office of Regulatory Staff in which Mr. McMilion states the following: "Citing U.S.C. title 42 section 1983 in regards to rule 103-300, 103-320 interfering with the obligation of contracts."

On October 17, 2019, Mr. McMilion filed correspondence with the Commission requesting an extension of time to file testimony. In the correspondence, Mr. McMilion states that he needs additional time so that he may "put forth a competent complaint."

² Order No. 2019-724, Docket No. 2019-230-E (Oct. 9, 2019).

II. Answer and Motion to Dismiss

DEC generally denies the allegations contained in the Complaint, and any claim not specifically addressed in this pleading is denied. The Company admits that, following the Commission's denial of Mr. McMilion's request for rehearing in his most recent complaint proceeding, Docket No. 2019-230-E, the Company dispatched a meter technician for the purposes of exchanging Complainant's existing meter with an Advanced Metering Infrastructure ("AMI") meter, and that Mr. McMilion refused the meter exchange.

a. The Complaint

Read generously, the Complaint appears to argue that S.C. Code Ann. Regs. 103-320, which permits electric utilities to furnish the meters by which service is measured, infringes upon Mr. McMilion's right to contract and impairs an existing contract in violation of his 14th amendment right to substantive due process. The Complaint also seems to claim or imply that the Company and Mr. McMilion have between them a contract requiring the use of an analog meter. These assertions are addressed below.

Importantly, it is not S.C. Code Ann. Regs. 103-320 that is the source of Mr. McMilion's frustration, it is the Company's use of a non-analog meter. The regulation cited by Complainant does not require the use of a particular meter but instead defers to the utility as to the meter to be used. In other words, the subject of the state action—permitting the utility to choose the meter—is not the matter at issue in this case. Indeed, if the Commission were to rule for Mr. McMilion and require the Company to install an analog meter, *that* would be state action about which a party could complain. As the regulation reads and applies, however, the regulation defers to the utility as to the meter to be used. For that reason, there is no state action that would result in a due process violation, a fact that is fatal to the Complaint in this case.

As explained in previous complaint proceedings brought by Mr. McMilion against the Company, Complainant's constitutional arguments—to the extent they are being applied to the Company—fail because the Company is not a state actor. Because the “state action” arguments relied upon by Complainant were addressed in the previous complaint proceedings initiated by Mr. McMilion, they will not be discussed at length here. However, the Company incorporates by reference the motions to dismiss filed in those proceedings,³ and relies upon the Commission's previous conclusion that “Duke is not a state actor.”⁴

The Complaint also fails because, contrary to Complainant's arguments, the Company does not have a contract with Mr. McMilion as to the use of a particular meter, so there is no contract to be impaired by S.C. Code Ann. Regs. 103-320. It is bedrock law that, in order to form a contract, there must be a meeting of the minds between the parties as to the essential and material terms of the contract.⁵ As further elucidated in *Player*,

[t]he “meeting of minds” required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known.⁶

The Company does not dispute that it agreed to provide service to Mr. McMilion. However, the use of a particular meter was not—and would not have been—a term of the Company's agreement to provide that service. Even if Mr. McMilion believed in 2013 that the Company was eternally

³ Duke Energy Carolinas, LLC's Motion to Dismiss Complaint, Docket No. 2018-379-E (Jan. 10, 2019); Duke Energy Carolinas, LLC's Motion to Dismiss Complaint, Docket No. 2019-230-E (July 3, 2019).

⁴ Order No. 2019-686 at 1, Docket No. 2019-230-E (Sept. 25, 2019).

⁵ *Player v. Chandler*, 299 S.C. 101, 105 (1989) (citing *Hughes v. Edwards*, 265 S.C. 529 (1975)) (*Player*).

⁶ *Id.*

bound to provide electric service using the analog meter then-installed at his residence, there was no “meeting of the minds” as to that condition, and Mr. McMilion’s intention or purpose as to that issue could not have been known by the Company.

Contrary to Complainant’s “contract theory” of utility service, once a prospective customer agrees to take service from the Company, the terms that apply to the provision of such service are the rate schedules on file with the Commission, including the Company’s Service Regulations, along with the relevant provisions of Title 58 and the Commission’s regulations. The Company’s Service Regulations stipulate in plain and unambiguous terms that “[t]he Company will furnish all necessary meters.” According to the Commission’s online eTariff system, that provision has been in place since at least 2009,⁷ well before Mr. McMilion began taking service from the Company in 2013.⁸ Likewise, S.C. Code Ann. Regs. 103-320 has been in effect since 2008. Therefore—while the Company does not agree with Complainant’s premise that no term of service may change after a customer begins taking service—to the extent one holds this position, it is worth pointing out that the publicly available terms of service that have been in place since Mr. McMilion began taking service have authorized the Company to install and use the meter of its choice.

The arguments in the Complaint are premised on the absurd position that nothing related to the provision of a utility’s service may change once a customer begins taking service from the utility. Such a position demonstrates a fundamental misunderstanding of the provision of regulated utility service, which is generally not based on individual agreements between utilities and their

⁷ Duke Energy Carolinas, LLC, Electricity No. 4, South Carolina Second Revised Leaf A (eff. Jan. 1, 2009), *available at* <https://etariff.psc.sc.gov/Attachments/revisionChangesFile/ebd5b91a-9bb1-ae82-851860157a9327cd>.

⁸ *See* McMilion Motion in Opposition to Motion to Dismiss at 2, Docket No. 2019-230-E (Sept. 13, 2019) (“The same electromechanical analog meter on my home is the same one that has been in use since I agreed to the service contract in the year 2013.”).

customers, but is instead based on *pro forma* terms contained in tariffs or schedules that are subject to the approval of a state commission. Such an approach promotes efficiency in that the utility is not required to negotiate individual contracts with its many customers, and because the Commission is not required to review and approve individual contracts for every utility customer in the state. This approach also prevents undue preference or discrimination that may occur when the terms of service applied to one customer vary from those applied to another customer. Consistent with this regulatory model, S.C. Code Ann. § 58-3-140(A) vests the Commission with the “with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State and to fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this State.” Pursuant to this statutory authority, the Commission regulates the provision of utility service primarily through the utility filing proposed schedules with the Commission, other parties—including individual members of the public, such as Mr. McMilion—intervening in the proceeding and providing their own perspective on the proposal, and the Commission making a decision on the merits. The Company challenges Mr. McMilion’s assertion that the terms of his service cannot change without his express consent. To the contrary, the terms of the Company’s service *have* changed since 2013. The Company has made countless filings after which the Commission has approved revisions to the terms of service provided by the Company since Complainant began taking service. According to eTariff, since 2013, the Company has modified its Residential Service tariff 8 times and its Energy Efficiency rider, which is incorporated into the Residential Service tariff, 7 times. The premise that a utility’s terms of service must remain static is absurd and should be rejected.

b. Relief Requested by Complainant

The Complaint asks that the Commission require the Company to “provide in writing [sic] in contract form the amended terms and conditions with full disclosure signed by both parties.” The Company repeats its position stated above that, contrary to Complainant’s arguments, the Company does not have a contract with Mr. McMilion as to the use of a particular meter. To the extent Mr. McMilion is requesting the terms applicable to the Company’s provision of electric service, those terms were provided in one of Mr. McMilion’s previous complaint proceedings, Docket No. 2019-230-E. In that proceeding, as part of the Company’s Motion to Dismiss, the Company provided the terms governing its provision of service to Mr. McMilion in the linked eTariff records in the Motion to Dismiss and, as a courtesy, the tariff records themselves were attached to that motion. Likewise, in response to Complainant’s request that the Company “honor the original contract (analog meter) not in dispute,” the Company would explain again that there was no “meeting of the minds” as to the meter to be used by the Company in measuring Mr. McMilion’s electricity usage, and therefore there is no contract governing that issue.

The Complaint also requests that the Commission “abolish or amend rule 103-320 as to not be inconsistent with law.” The repeal of S.C. Code Ann. Regs. 103-320 would not have the intended effect of requiring the Company to use an analog meter. Mr. McMilion actually seeks an order from the Commission requiring the Company to install and utilize an analog meter. The Company would oppose such a request—were it made—on various grounds, but principally because the meter requested by Mr. McMilion is obsolete and is no longer supported by the Company, as discussed in filings made in previous proceedings involving Complainant. The Company also relies upon the fact that there has been no “meeting of the minds” as to the use of an analog meter, and therefore no contract exists between itself and Complainant as to that issue.

Instead, the terms that apply to the provision of the Company's service are the rate schedules filed with the Commission. Among those rate schedules is the Manually Read Meter rider, which would permit Mr. McMilion to avoid the installation of a smart meter were he simply to request that the Company to enroll him in that rider.

c. Complaint's Extension Request for Testimony

Mr. McMilion also filed in this proceeding correspondence requesting an extension of time to file testimony. In the correspondence, Mr. McMilion states that he needs additional time so that he may "put forth a competent complaint." The Company does not believe testimony is necessary in this proceeding as the filed Complaint fails to allege any violation on the part of the Company as to any applicable statute or regulation for which the Commission can grant relief, and, pursuant to S.C. Code Ann. § 58-27-1990, a hearing in this case is not necessary for the protection of substantial rights. For these reasons, an extension of time to permit the parties to file testimony would serve no other purpose than to delay the resolution of this proceeding. Judicial efficiency would not be served by a prolonged proceeding in which the Complaint does not make an adequate allegation of violation, particularly when Complainant has already filed—and had dismissed—two prior complaints on the same issue.

Because, in the Company's view, an extended testimony schedule would not serve judicial efficiency, the Company instead requests that the Clerk's office delay establishing a procedural schedule—including testimony filing deadlines and a hearing date—until such time as the Commission has ruled on this Motion to Dismiss.

CONCLUSION

The Complaint filed in this proceeding contains no allegation that DEC violated any applicable statute or regulation for which the Commission can grant relief, and a hearing in this

case is not necessary for the protection of substantial rights. Therefore, pursuant to S.C. Code Ann. § 58-27-1990, this matter should be dismissed.

WHEREFORE, the Company moves the Commission to dismiss this matter with prejudice; requests that the Clerk's office delay establishing a procedural schedule until such time as the Commission has ruled on this Motion to Dismiss; and requests such other relief as the Commission deems just and proper.

Heather Shirley Smith, Deputy General Counsel
 Rebecca J. Dulin, Associate General Counsel
 Duke Energy Carolinas, LLC
 40 West Broad St, Suite 690
 Greenville, SC 29601
 Telephone 864.370.5045
heather.smith@duke-energy.com
rebecca.dulin@duke-energy.com

and

s/Samuel J. Wellborn

Frank R. Ellerbe, III (SC Bar No. 01866)
 Samuel J. Wellborn (SC Bar No. 101979)
 ROBINSON GRAY STEPP & LAFFITTE, LLC
 P.O. Box 11449
 Columbia, SC 29211
 (803) 929-1400
fellerbe@robinsongray.com
swellborn@robinsongray.com

Attorneys for Duke Energy Carolinas, LLC

Columbia, South Carolina
 November 14, 2019

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2019-331-E

Enrique McMilion, Jr.,)
)
Complainant/Petitioner,)
)
v.)
)
Duke Energy Carolinas, LLC,)
)
Defendant/Respondent.)
_____)

CERTIFICATE OF SERVICE

This is to certify that I, Toni C. Hawkins, a paralegal with the law firm of Robinson Gray Stepp & Laffitte, LLC, have this day caused to be served upon the person(s) named below the **Answer and Motion to Dismiss on behalf of Duke Energy Carolinas, LLC** in the foregoing matter by placing a copy of same in the U.S. Mail and/or via electronic mail addressed as follows:

Enrique McMilion, Jr.
200 Evergreen Church Road
Starr, SC 29684
Email: emcmilion3@gmail.com

Jeffrey M. Nelson, Counsel
Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia, SC 29201
Email: jnelson@ors.sc.gov

Dated at Columbia, South Carolina this 14th day of November, 2019.


